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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jonathan Smith, on behalf of himself and others similarly situated,

No. CV-22-01732-PHX-GMS

ORDER

Plaintiff,

V.

Assurance IQ, LLC, d/b/a Mortgage.net,

Defendant.

Pending before the Court is Defendant Assurance IQ, LLC's Motion to Dismiss (Doc. 16). For the following reasons, Defendant's motion is denied.

BACKGROUND

For approximately ten years, Plaintiff Jonathan Smith has been the sole user of the telephone number (XXX) XXX-3226. (Doc. 13 at 2.) In June 2022, without Plaintiff's consent, Defendant called Plaintiff's cell phone sixteen times. (*Id.* at 3–4.) At least two of the sixteen calls were artificial or prerecorded voice messages regarding a mortgage loan and an insurance request. (*Id.* at 3.) Defendant intended to reach Peter Marshall, an individual unknown to Plaintiff. (*Id.* at 3–4.) Plaintiff returned Defendant's calls and informed Defendant that he was not Peter Marshall. (*Id.* at 4.) Defendant acknowledged that it called the wrong number and ceased contacting Plaintiff. (*Id.*; Doc. 16 at 2, 7.)

Plaintiff thereafter filed his First Amended Class Action Complaint (Doc. 13) against Defendant under the Telephone Consumer Protection Act (the “Act” or “TCPA”),

1 47 U.S.C. § 227, requesting treble damages amongst other relief. (Doc. 13 at 10.) In
 2 response, Defendant filed a motion to dismiss Plaintiff's request for treble damages with
 3 prejudice. (Doc. 16 at 2.)

4 **DISCUSSION**

5 **I. Legal Standard**

6 Federal Rule of Civil Procedure 8(a) requires a complaint to contain “a short and
 7 plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P.
 8 (a), so that the defendant receives “fair notice of what the . . . claim is and the grounds
 9 upon which it rests,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley*
 10 *v. Gibson*, 355 U.S. 41, 47 (1957)) (omission in original). To survive a motion to dismiss
 11 for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint
 12 must contain factual allegations sufficient to “raise a right to relief above the speculative
 13 level.” *Id.* When analyzing a complaint for failure to state a claim, “allegations of material
 14 fact are taken as true and construed in the light most favorable to the nonmoving party.”
 15 *Buckey v. Cnty. of L.A.*, 968 F.2d 791, 794 (9th Cir. 1992). Legal conclusions couched as
 16 factual allegations, however, are not given a presumption of truthfulness, and “conclusory
 17 allegations of law and unwarranted inferences are not sufficient to defeat a motion to
 18 dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

19 **II. Analysis**

20 Plaintiff pleads sufficient facts to survive a motion to dismiss. To establish a claim
 21 under the TCPA for violating 47 U.S.C. § 227(b)(1)(A)(iii), a plaintiff must plead that
 22 (1) the defendant called a telephone number (2) using an automatic telephone dialing
 23 system (3) for non-emergency purposes (4) without the recipient's prior express consent.
 24 47 U.S.C. § 227(b)(1)(A)(iii); see *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d
 25 1036, 1043 (9th Cir. 2012). The Act “allows a plaintiff to recover ‘actual monetary loss’
 26 when that loss is higher than the fixed statutory award of \$500 per negligent violation”
 27 *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 809 (9th Cir. 2017) (Tallman, J.,
 28 dissenting) (quoting 47 U.S.C. § 227(b)(3)). A court may award treble damages “if ‘the

1 defendant willfully or knowingly violated' the Act." *Campbell-Ewald Co. v. Gomez*, 136
 2 S. Ct. 663, 67 (2016) (quoting 47 U.S.C. § 227(b)(3)). In doing so, Plaintiff alleged that
 3 Defendant's practice of making automated calls to persons whose names it has obtained
 4 through webform submissions inevitably results in at least some calls being made to
 5 persons who have not provided consent to such calls. It further alleges facts by which
 6 Defendant was actually aware of this fact. (Doc. 13 at 5–6.)

7 Defendant asserts that Plaintiff's request for treble damages should be dismissed for
 8 failure to adequately allege a "willful" or "knowing" violation. (Doc. 16 at 4–7.) In
 9 support of its request, Defendant cites four district court cases. *See e.g.*, *Canary v.*
 10 *Youngevity Intl, Inc.*, No. 5:18-CV-03261-EJD, 2019 WL 1275343, at *9 (N.D. Cal. Mar.
 11 20, 2019) (dismissing plaintiff's cause of action for treble damages because plaintiff "failed
 12 to adequately plead a violation of the TCPA [for statutory damages] and because it consists
 13 of nothing more than bare-bones legal conclusions unsupported by facts"); *Woods v. CV*
 14 *McDowell, LLC.*, No. CV H-17-0152, 2018 WL 1187492, at *4 (S.D. Tex. Feb. 5, 2018),
 15 *memorandum and recommendation adopted Woods v. CV McDowell, LLC*, No. 4:17-CV-
 16 00152, 2018 WL 1183714 (S.D. Tex. Mar. 5, 2018) (denying a request for treble damages
 17 because "there are simply insufficient allegations in the Complaint, and no evidence
 18 submitted by Plaintiffs with his Motion for Default Judgment, that would support an award
 19 of treble damages based on defendant's willful violations of § 227(b)(1)(B)"); *Castro v.*
 20 *Cap. One Servs., LLC*, No. 8:16-CV-889-T-17TGW, 2017 WL 4776973, at *4–5 (M.D.
 21 Fla. Aug. 3, 2017) (granting in part Plaintiff's motion for default judgment and awarding
 22 statutory damages but not treble damages because the "sparse record in this case does not
 23 adequately support a finding that [the] Defendant[s] acted willfully or knowingly")
 24 (quoting *Dores v. One Main Fin.*, No. 1:15-cv-01609-LO-MSN, 2016 WL 3511744, at *3
 25 (E.D. Va. June 1, 2016)) (alterations in original); *Health One Med. Ctr., Eastpointe,*
 26 *P.L.L.C. v. Mohawk, Inc.*, No. 16-CV-13815, 2017 WL 1132337, at *2 (E.D. Mich. Mar.
 27 27, 2017) (granting default judgement and awarding statutory damages but not treble
 28 damages because the "plaintiff has not articulated which of its allegations would support a

1 finding that the violations were willful or knowing").

2 The *Canary* line of cases is distinguishable. The plaintiff's claims were dismissed
 3 because the "allegations [were] insufficient to support a plausible inference that [the
 4 defendant] made the call." 2019 WL 1275343, at *3. Because the plaintiff failed to plead
 5 a violation under the Act, the court dismissed plaintiff's request for treble damages. *Id.* at
 6 *9. Here, Defendant does not dispute that it made at least one of the sixteen calls to
 7 Plaintiff. (Doc. 13 at 3-4, ¶¶ 15–16, 33.) Moreover, Defendant does not challenge
 8 Plaintiff's claim that (1) Defendant called Plaintiff's cell phone number (2) using an
 9 automatic telephone dialing system (3) for non-emergency purposes (4) without the
 10 Plaintiff's prior express consent. *See* 47 U.S.C. § 227(b)(1)(A)(iii). The remaining cases
 11 relied on by Defendant address awarding treble damages in the context of a default
 12 judgment, not a motion to dismiss.

13 Plaintiff has plausibly alleged that Defendant knew it was making at least some
 14 automated calls to persons who had not authorized those calls. Courts in the Ninth Circuit
 15 have declined to dismiss causes of action for knowing or willful violations and requests for
 16 treble damages when the plaintiff sufficiently pleads that a defendant knowingly or
 17 willfully used an automatic telephone dialing system to contact the plaintiff without prior
 18 express consent. *See e.g., Keifer v. HOSOPCO Corp.*, No. 3:18-cv-1353-CAB-(KSC), 2018
 19 WL 5295011, at *3, 5 (S.D. Cal. Oct. 25, 2018) ("[T]he Court finds the knowing and willful
 20 violations of the TCPA have been sufficiently pled [because t]he FAC alleges, that 'the
 21 foregoing acts and omissions of Defendant constitute numerous and multiple knowing
 22 and/or willful violations of the TCPA.'") (citing the record); *Pacleb v. Cops Monitoring*,
 23 No. 2:14-CV-01366-CAS, 2014 WL 3101426, at *2, 4 (C.D. Cal. July 7, 2014) (finding
 24 that the "allegations are sufficient to state claims for negligent, knowing, and/or willful
 25 violations of the TCPA" after the "[p]laintiff alleges that these actions resulted in negligent,
 26 knowing, and/or willful violations of the TCPA").

27 Here, Plaintiff alleges that on May 12, 2020, Defendant filed a Petition for
 28 Expedited Declaratory Ruling with the Federal Communications Commission seeking a

1 declaratory judgment regarding a pending lawsuit. (Doc. 13 at 5.) The lawsuit concerned
 2 a plaintiff who “filed a class action complaint alleging that he did not consent to [a] call,
 3 and that Assurance violated the TCPA’s delivery restrictions.” (*Id.*) Defendant noted in
 4 the petition that “the company faces potential liability in a putative nationwide TCPA class
 5 action lawsuit for calls made based on a reasonable and good faith belief that a valid
 6 consent had been obtained,” and “in the absence of the relief sought, callers cannot safely
 7 call numbers obtained via only webform submissions.” (*Id.* at 5–6) (internal quotation
 8 omitted.) According to Plaintiff, “*Defendant was aware*” two years before calling Plaintiff,
 9 that its process “was susceptible to causing Defendant to deliver prerecorded messages to
 10 persons from whom it may not have consent.” (*Id.* at 6) (emphasis added). Moreover,
 11 Plaintiff alleges that “*Defendant [was] well aware*, the North American Numbering Plan
 12 Administrator allocates a limited quantity of telephone numbers to voice service providers,
 13 usually in blocks of a thousand numbers. These providers routinely ‘recycle’ telephone
 14 numbers by returning them to their aging numbers pool for a period following
 15 disconnection and by subsequently reassigned them to new subscribers.” (*Id.*) Also, the
 16 Federal Communications Commission noted that approximately thirty-five million
 17 telephone numbers are disconnected each year, and one hundred thousand numbers are
 18 reassigned [] daily. (*Id.*) (emphasis added).

19 Plaintiff asserts that “Defendant, as a matter of pattern and practice, uses an artificial
 20 or prerecorded voice in connection with calls it places to telephone numbers assigned to a
 21 cellular telephone service, absent prior express consent.” (*Id.*) Defendant “delivered to
 22 telephone number (XXX) XXX-3226 at least two artificial or prerecorded voice
 23 message[s].” (*Id.* at 3.) Defendant voluntarily contacted Plaintiff without his prior consent,
 24 (*Id.* at 4), for non-emergency purposes, (*Id.*). And, as a result, Plaintiff suffered actual
 25 harm, “an invasion of privacy, an intrusion into his life, and a private nuisance.” (*Id.* at 6.)

26 As shown above, a combination of allegations like those in Plaintiff’s First
 27 Amended Complaint (Doc. 13) are sufficient to withstand a motion to dismiss. Thus,
 28 Plaintiff’s allegations, accepted as true for the purposes of this motion, “raise a right to

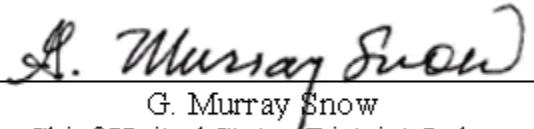
1 relief above the speculative level" that Defendant willfully and knowingly violated the
2 TCPA. *See Twombly*, 550 U.S. at 555.

3 **CONCLUSION**

4 Accordingly,

5 **IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss (Doc. 16)
6 is **DENIED**.

7 Dated this 21st day of November, 2023.

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10 G. Murray Snow
Chief United States District Judge

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